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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

TOM HATCH,

Plaintiff and Appellant,

v.

HSBC BANK, USA, N.A.,

Defendant and Respondent.

F065424

(Super. Ct. No. CV-273411)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. David R. Lampe, Judge.

Tom Hatch, in pro. per., for Plaintiff and Appellant.

Katten Muchin Rosenman, Darrell P. White, Stuart M. Richter, Gregory S. Korman and Sara Karubian for Defendant and Respondent.

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* Before Kane, Acting P.J., Franson, J. and Peña, J.

Appellant Tom Hatch appeals the lower court judgment entered in favor of respondent HSBC Bank, USA, N.A. (HSBC Bank), following a sustaining of respondent's demurrer without leave to amend to appellant's third amended complaint.

On appeal from a judgment sustaining a demurrer without leave to amend, the reviewing court exercises independent review to determine whether the complaint states facts sufficient to state a cause of action. The court assumes the truth of the factual allegations, but not the truth of conclusions of law. (*Leonte v. ASC State & Local Solutions, Inc.* (2004) 123 Cal.App.4th 521, 525; *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) In considering whether the trial court erred in refusing to allow amendment of a pleading, the appellate court's standard of review is based on an abuse of discretion review. It is the plaintiff who has the burden of proving that an amendment would cure the defect. (*Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 711; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

The court sustained demurrers to appellant's complaint, first amended complaint and second amended complaint before sustaining without leave to amend the demurrer to the third amended complaint. It is the third amended complaint that is the subject of this appeal. It purports to allege causes of action for an invalid assignment of a trust deed, intentional misrepresentation of fact, negligent misrepresentation, and declaratory relief.

In relevant part, the third amended complaint alleges that appellant purchased residential property in 2005. The original lender was Crevecor Mortgage, Inc., and the original beneficiary was MERS, acting solely as nominee for the lender. While attempting to obtain a mortgage to purchase the property, a loan officer at Castle Home Loans, Inc., now defunct, told appellant that he could obtain a mortgage from Crevecor and have a monthly mortgage payment of \$1,800. Appellant obtained the mortgage loan from Crevecor based on that representation and completed the purchase of his home. The loan officer was wrong. The monthly payment was \$3,400 per month. While Castle made the payment for the first three months, appellant made the \$3,400 mortgage

payments for almost three years. HSBC Bank then acquired appellant's mortgage loan and has since that time acted through its subsidiary, HSBC Mortgage, LLC, as the loan servicer.

In 2008, appellant experienced financial difficulties as a result of losing his job. He contacted HSBC Mortgage about obtaining a loan modification and was told by an employee of HSBC Mortgage that it would “work with [appellant]’ in obtaining a loan modification, that said modification would reduce [appellant’s] payments to a ‘reasonable’ level, and that, if approved for such a loan modification, the monthly payment amount would be ‘fair and reasonable.’” A loan modification was approved, but instead of being reduced to a “‘fair and reasonable’” amount, it was reduced by only \$200 per month. Appellant’s subsequent applications for loan modification were denied.

Appellant alleges that HSBC Mortgage had no right, title or interest in the subject property, but merely acted on behalf of the holder in collecting payments on mortgages. However, in July 2008, an assignment of trust deed was filed, claiming to transfer the beneficial interest from MERS to HSBC Mortgage. This document was signed in Los Angeles by a Stella M. Flores, claiming to be an “assistant secretary” of MERS. Appellant then alleges on information and belief that as a mere nominee for the beneficiary, “MERS ... never had possession of the underlying note, nor the right to transfer it to anyone.” Appellant further alleges that the assignment was not signed by an *officer*, but rather by an assistant secretary and therefore on information and belief that Ms. Flores did not have the authority to sign the trust deed on behalf of MERS. Thereafter, HSBC Mortgage substituted House Key Financial Corporation as trustee under the deed of trust, with HSBC Mortgage claiming to be the beneficiary, servicer and lender.

The first cause of action is entitled “Invalid Assignment of Trust Deed.” Appellant alleges that MERS had no possession or ownership of the note, did not have the right and authority to convey an interest in the trust deed, and that the purported

assignment of trust deed was not signed by an officer of MERS but rather by an assistant secretary without legal authority to assign the trust deed on behalf of MERS.

Accordingly, appellant alleges the attempted assignment was invalid and, as a result, HSBC Mortgage could not appoint any entity as trustee of the deed of trust, making the attempted substitution invalid. Thus, neither House Key nor HSBC was authorized to foreclose on appellant's property.

The gravamen of appellant's first cause of action is his allegation that MERS's assistant secretary lacked authority to sign the assignment. Appellant fails to allege factual support for that legal conclusion. He also failed in both the lower court and in this court to cite any legal authority supporting his conclusion that as a factual or legal matter Ms. Flores was not authorized to execute a binding assignment of trust deed on behalf of MERS. As HSBC Bank points out, the assignment was attached to the third amended complaint, showing that it was notarized and recorded. Appellant alleges that Ms. Flores was an "assistant secretary" of MERS. He then argues, without any legal support, that she was not legally authorized to execute a binding assignment. He had four opportunities in the lower court to allege additional facts and supporting legal authority and failed to do so. The lower court correctly sustained the demurrer to this cause of action.

The second cause of action is entitled "Intentional Misrepresentation of Fact." Appellant alleges that HSBC Bank's employee made promises about material facts without any intention of performing them, that is, he told appellant that HSBC Bank was willing to negotiate with appellant to modify the loan, and that it was possible for appellant to obtain a "fair and reasonable" loan modification. Appellant alleges that these assurances were made with the intent to defraud and induce appellant to rely upon them, which appellant in fact did by not reasonably seeking other re-funding options. Appellant alleges he was damaged by not receiving a reasonable loan modification that would allow him to retain his property.

The second cause of action for intentional misrepresentation of fact also fails to state a cognizable cause of action. Appellant refers to several alleged misrepresentations. The first was that he was told that HSBC Mortgage was willing to negotiate with appellant to modify the loan. On the other hand, he admits that his loan was modified and his monthly payment was reduced by \$200. He goes on to allege that HSBC Bank promised to obtain a “‘fair and reasonable’” loan modification for him and that this did not occur. A cause of action based on intentional misrepresentation requires proof that the defendant falsely represented an important fact. Ordinarily, an opinion is not considered a representation of fact. For example, a statement regarding a future event or a judgment about quality, value, authenticity or similar matters are considered opinions and not representations of fact. (CACI No. 1904; *Cohen v. S & S Construction Co.* (1983) 151 Cal.App.3d 941, 946.) Here, appellant alleges that HSBC Bank’s representatives told him that “‘it was possible for [appellant] to obtain a ‘fair and reasonable’ loan modification” (Par. 47 of third amended complaint.) That is not a statement of fact, but more reasonably characterized as one of opinion, which cannot be the basis for this cause of action. (*Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 835.)

HSBC Bank also argues that the “‘fair and reasonable’” representation is too vague for the court to enforce. We agree. What is fair and reasonable to one may not be to another. The phrase “fair and reasonable” lacks sufficient specificity from which it could be objectively evaluated and enforced. A promise must be definite enough that a court can determine the scope of the duty, and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages. (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 770 & authorities cited therein; *Cal. Lettuce Growers v. Union Sugar Co.* (1955) 45 Cal.2d 474, 481 [where contract is so uncertain and indefinite that the intention of the parties in material particulars cannot be ascertained, the contract is void and unenforceable]; Civ. Code, § 1598 [contract vaguely expressed is void]; *Rochlis v. Walt Disney Co.* (1993) 19 Cal.App.4th 201, 216

[“Promises too vague to be enforced will not support a fraud claim any more than they will one in contract.”], overruled on other grounds in *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251.)

It was incumbent upon appellant to also allege that the false promises on which he reasonably relied were a substantial factor in causing him harm. (CACI No. 1900; *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974.) He alleges that the misrepresentations about a loan modification caused him not to seek other funding options; however, he never explains or alleges that had he sought other funding options, he would have in fact been successful in those efforts and had his mortgage payments reduced. In other words, he has failed to allege facts that his reliance on the misrepresentations caused him harm. The lower court correctly sustained the demurrer to the second cause of action.

The third cause of action is entitled “Negligent Misrepresentation of Fact.” Appellant alleges that the misrepresentations referred to in the second cause of action are the basis for his third cause of action and asserts that when the promises were made, HSBC Bank had no reasonable grounds for believing they were true. This cause of action rests upon the existence of a legal duty imposed by contract, statute or otherwise. (*Eddy v. Sharp* (1988) 199 Cal.App.3d 858, 864.) A lender does not owe a tort duty of care to its borrowers absent exceptional circumstances, and none are alleged here. (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096; *Kinner v. World Sav. & Loan Assn.* (1976) 57 Cal.App.3d 724, 732.) The relationship between appellant and HSBC Bank was that of borrower and lender. Appellant does not allege that HSBC Bank owed him a duty of care, nor do the facts alleged support such a conclusion. Moreover, the failure to allege misrepresentation of a fact and the failure to allege detrimental reliance validate the lower court order sustaining the demurrer to the third cause of action.

The fourth cause of action is entitled “Declaratory Relief.” Appellant desires a judicial determination as to who were the actual owner and holder of the note, mortgage loan, and beneficial interest, and whether the assignment of the trust deed was valid or invalid. This cause of action is based on the allegations of the first cause of action for invalid assignment of trust deed. For the same reasons that the first cause of action fails to state a cause of action, the fourth cause of action is likewise deficient.

Finally, on the issue of whether the trial court abused its discretion in denying further leave to amend, we find no abuse. Appellant filed four different complaints and was unable to cure the deficiencies cited by the trial court. Appellant has not presented any new arguments to this court indicating that he can cure the pleading deficiencies by amendment.

DISPOSITION

The lower court judgment is affirmed. Costs are awarded to HSBC Bank.